80-363

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JULIANN LEWIS, Petitioner,

vs.

JOHN M. LEWIS AND
THE NATIONWIDE MUTUAL INSURANCE
COMPANY, Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Franklin County, Ohio
Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The first question presented for review is whether the Doctrine of Interspousal Immunity is violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

2. The second question presented for review is if a person negligently operates an automobile causing catastrophic injuries to another person as a result of said negligence and subsequently the parties marry, does the application of the Doctrine of Interspousal Immunity constitute a deprivation of the injured person's due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution.

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OPINIONS BELOW

On June 27, 1980, the Supreme Court of Ohio overruled petitioner, Juliann Lewis' motion to certify the record and also on said date the Supreme Court of Ohio dismissed her appeal for the reason that the Supreme Court of Ohio determined that no substantial constitutional question existed. These orders of the Supreme Court of Ohio are reproduced herein in the Appendix on page B. The Journal Entry of Judgment and Decision of the Franklin County, Ohio, Court of Appeals rendered on March 13, 1980, are reproduced herein in the Appendix on page C. The decision of the Franklin County, Ohio, Trial Court of October 4, 1979, is reproduced in the Appendix herein on page D. The Entry of the Franklin County, Ohio Trial Court of November 6,

1979, is reproduced in the Appendix herein on page E. None of these opinions have been reported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 27, 1980. This court has jurisdiction pursuant to 28USCA §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States is the constitutional provision involved in this case. The complete text of the Amendment is reproduced in the Appendix herein on page F.

STATEMENT OF CASE

On February 4, 1978, petitioner, Juliann Lewis, then Juliann Millican, was a passenger in her own automobile driven by the respondent, John M. Lewis, on Interstate

Highway 270, in Franklin County, Ohio. Respondent, Lewis, negligently operated petitioner's 1974 Oldsmobile automobile off the road and into an icebank. In the accident Juliann Lewis suffered catastrophic injuries. The parties had stipulated that Michael S. Lehv, M.D.'s report of February 22, 1979, would be his testimony given by deposition. We have reproduced Dr. Lehv's report in the Appendix herein on page G. Dr. Lehv is a highly qualified plastic surgeon and we respectfully request that the court carefully review Dr. Lehv's testimony to understand the massive injuries sustained by Juliann Lewis. Mrs. Lewis' entire face was crushed and she suffered multiple fractures, broken palate, etc. She has been disfigured and it has been necessary for her to undergo four (4)

operations since February 10, 1978. She may have additional operations. Mrs. Lewis' deposition, which has been sent to this court as part of the record, also indicates the terrible injuries she has suffered. It is uncontroverted that as a result of this accident Juliann Lewis suffered horrible injuries including substantial pain and suffering, permanent disfigurement and permanent disability. She was in intensive care for sometime and the initial surgery lasted eight and one-half hours. She could not speak or eat for a long period of time. Her medical and hospital expenses incurred thus far have been over Eleven Thousand Dollars ($11,000.00) and she probably will incur more bills in the future. As a result of the accident and the required four surgeries she has been unable to work for

a substantial period of time.

On March 17, 1978, petitioner married the respondent, John M. Lewis. On March 20, 1979, Juliann Lewis, filed a negligence action against John M. Lewis and the Complaint also included respondent, The Nationwide Mutual Insurance Company, as a party defendant based primarily on Nationwide Mutual Insurance Company's refusal to arbitrate pursuant to the uninsured motorists coverage of the insurance policy contract. Respondent, Nationwide, insured the automobile owned by Juliann Lewis at the time of the accident. Petitioner has not pursued the original claim against Nationwide based on their refusal to arbitrate in accordance with the uninsured motorists coverage of the insurance policy contract. Ultimately the trial court sustained re-

spondent's motion for summary judgment based on the Doctrine of Interspousal Immunity. As has been indicated, the Franklin County Court of Appeals affirmed the judgment and the Supreme Court of Ohio overruled petitioner's motion to certify the record.

Petitioner raised the constitutional questions presented herein at the earliest possible time which was petitioner's memorandum contra respondent's motion for summary judgment in the trial court. Page Four of petitioner's memorandum contra, which was filed in the Franklin County Court of Common Pleas on September 25, 1979, provides in part as follows:

> "A rule denying a husband or a wife the right to sue the other for negligence is a flagrant violation of this constitutional provision (Article I, §16, of the Ohio Constitution) as well as a violation of the due process

and equal protection clauses of the Fourteenth Amendment to the United States Constitution."

The Assignments of Error prepared by the petitioner to the Franklin County, Ohio, Court of Appeals indicates that petitioner maintained her claim that her Fourteenth Amendment rights were being deprived. This can be seen by the decision of the Franklin County, Ohio, Court of Appeals which recites the Assignments of Error on page C2 of the Appendix herein. The decision of this Court of Appeals indicates that the court considered the constitutional issue but declined to rule on the matter. Pursuant to the local rules of the Ohio Supreme Court, the petitioner properly indicated in the Memorandum in Support of Jurisdiction filed in the Supreme Court of Ohio on May 8, 1980, that the case involved

a substantial constitutional question. As has been shown, on June 27, 1980, the Supreme Court of Ohio ruled that no substantial constitutional question existed in the case. There is no question that petitioner has raised the constitutional question at the earliest possible time in the trial court and has continued to raise the issue in the Franklin County, Ohio, Court of Appeals and the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

A rule denying a husband or a wife the right to sue the other for negligence is a flagrant violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The reasons expressed by the courts to

allegedly support the Doctrine of Interspousal Immunity are the following:

(1) Supposedly the immunity provides marital harmony by discouraging spouses from suing each other; (2) supposedly the doctrine prevents fraud and collusion at the expense of insurance companies; and (3) finally, the doctrine is supposedly a matter of public policy. If the court thinks that some of the reasons for the doctrine are valid, as a compromise the Doctrine of Interspousal Immunity could be modified. That is, there could be a presumption that negligence actions between spouses prevent marital harmony and a jury could be instructed to find for the defendant unless this presumption was rebutted by clear and convincing evidence. Moreover, there could be a presumption that

negligence actions between spouses contain collusion between the parties and a jury could be instructed to find for the defendant unless it finds by clear and convincing evidence that the presumption is rebutted.

In accordance with Rule 17 of this court there are special and important reasons for granting the Writ of Certiorari requested herein. An examination of the status of the Doctrine of Interspousal Immunity indicates that the State Supreme Courts of our country have decided the issue differently. Approximately nineteen State Supreme Courts have ruled that the Doctrine of Interspousal Immunity is valid and approximately twenty-seven State Supreme Courts have ruled that the Doctrine of Interspousal Immunity is not valid.

We respectfully direct the court's attention to 92 ALR 3rd 901, "Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions" (1979), where a complilation of most all of the recent decisions regarding this issue is contained. Generally Arizona, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Oregon, Pennsylvania, Tennessee, Utah, Wyoming and Ohio have determined that the Doctrine is valid. Alaska, Alabama, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Kentucky, Maine, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Vermont, Washington,

West Virginia and Wisconsin have abrogated the Doctrine of Interspousal Immunity. On page 908 of the annotation it is stated in part as follows:

> "While courts in jurisdictions upholding the immunity have rejected contentions that the immunity is violative of due process or equal protection under relevant state or federal constitutional provisions, courts in jurisdictions abrogating the immunity have found it violative of the fundamental principle that any person injured by the act of another should be afforded a remedy in the courts."

In 43 ALR 2d 647, "Right of One Spouse to Maintain Action Against Other for Personal Injury" (1979), there is a study of all of the jurisdictions rule on this issue. The thorough annotation provides in part as follows:

> "The view which most law writers have characterized as the better

> rule and which is gradually finding more widespread acceptance, is that a spouse may sue his or her spouse, for personal injuries in exactly the same way that he might bring a suit for such injuries against the same party if the two were not married."

Juliann Lewis suffered catastrophic injuries in the accident as a result of the negligence of her now husband, John M. Lewis. If the Doctrine of Interspousal Immunity is applied she will not be treated equally with other individuals who are involved in automobile accidents. This is particularly true with respect to serious automobile accidents. The basis for the restriction is not logical and there is no valid reason for the unequal treatment. In Varholla vs. Varholla, 56 Ohio St. 2d 269 383 N.E. 2d 888 (1978) the Supreme Court of Ohio upheld the Doctrine of Inter-

spousal Immunity. In a dissenting opinion Justice William B. Brown has written an articulate and persuasive argument for determining that the Doctrine of Interspousal Immunity is unconstitutional. On page 891 of his opinion, Justice Brown states in part as follows:

> "To begin with, the class discriminated against under interspousal immunity is very similar to that which was discriminated against under the guest statute. Its distinguishing feature is that it comprises individuals who know the driver or other negligent individual they may later wish to sue. The reasons advanced for discriminating against that class are also almost indentical. They are to prevent collusive suits against those insuring negligent drivers or other negligent individuals and to promote a socially useful cause (hospitality and domestic harmony).
>
> Moreover, both classifications deny equal protection because they impose differential treatment which does not suitably

further an appropriate governmental interest. Police Dept. of Chicago v. Mosley (1972), 408 U.S. 92,95,92,S.Ct. 2286, 33 L.Ed. 2d 212. While it is possible that preserving happy marriages is a more appropriate governmental interest than is preserving hospitality, interspousal immunity does not do more to further that interest than the guest statute did to further hospitality. (Indeed, the guest statute did further hospitality to the extent that, by immunizing those who drove friends, it encouraged car pooling, etc. Since husbands and wives are likely to drive in the same car or otherwise be together when the negligence of one may injure the other and they are likely to do so even if the marriage is an unhappy one, interspousal immunity has no similar function.) In addition, neither the statute nor the doctrine is necessary to prevent collusion. The deterrent of perjury charges and the safeguards of pre-trial discovery and cross-examination apply whether the suit against a driver is brought by his friend or his wife. Also, while it is possible that collusion may be greater between spouses than friends, the number of spouses likely to be injured

by the negligence of a married partner is greater than that of persons injured by negligently driving friends. As a result, spouses denied the right to sue under interspousal immunity are as over-inclusive a class as were friends denied the right to sue under the guest statute.

Given the fact that spouses denied the right to sue under the interspousal immunity doctrine are discriminated against in the same manner and for equally unconvincing reasons as are friends denied the right to sue under a guest statute, I submit that the doctrine of interspousal immunity violates the Equal Protection Clause of the United States Constitution.

Interspousal immunity also creates a conclusive presumption which, like the one created by the guest statute, unconstitutionally denies due process.

"* * * [P]ermanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments," especially when they are "not necessarily or universally true in fact, and when the state has reasonable alternative means of making the

> crucial determination." Vlandis v. Kline (1973), 412 U.S. 441, 446 and 452, 93 S.Ct. 2230, 2233 and 2236, 37 L.Ed.2d 63. When the majority upholds a rule of law preventing spouses from suing one another for the injuries caused by their negligent tortious acts, it establishes the same conclusive presumption that lawsuits filed by a particular class of individuals are fraudulent or collusive as the General Assembly established when it wrote the guest statute. Neither presumption is necessarily or universally true in fact. Moreover, in the case of guests or spouses, the state, through the normal judicial process, has such reasonable alternative means of winnowing fraudulent from non-fraudulent claims as pre-trial discovery, etc. Under the reasoning of the Primes opinion, I submit that interspousal immunity violates the Due Process Clause of the United States Constitution."

An analysis of the reasons for the doctrine clearly show them not to be applicable in this case. That is, no marital harmony is continued by denying Juliann

Lewis the right to sue John M. Lewis in this case. Obviously, in this case Juliann Lewis and John M. Lewis did not conspire to make a claim with respect to this accident. The lawsuit is not a spurious lawsuit and no public policy is served by denying the petitioner, Juliann Lewis, the right to maintain a claim for her very severe injuries.

In a very recent case, this court has indicated its current thinking with respect to matters between husbands and wives. In Trammel vs. United States, 26 Criminal Law Reporter 21 (February 27, 1980), this court ruled that the common-law privilege precluding one spouse from testifying against the other in criminal proceedings unless both parties consent is modified so that the choice of whether such testimony

should be given belongs to the witness spouse alone. This decision is relevant to the case herein because of the attitude taken by this court to the marital relationship and to the concept of "marital harmony". The court indicated that the basis for the rule against adverse spousal testimony is the alleged fostering of "marital harmony". This court has now determined that the concept of "fostering marital harmony" must be carefully scrutinized using a modern and rational approach. If facts indicate that in reality "marital harmony" is not actually enhanced, the concept is not to be used unrealistically. It is clear that this court is more concerned with fairness and justice regarding relationships between spouses than they are in unrealistically attempting to preserve "marital harmony".

This court has indicated that it is looking carefully at all of the facts regarding these kinds of cases and will not permit archaic rules to exist which have no rational basis, particularly when the facts are as they are in the instant case. It would appear that the states which have absolutely continued to enforce the Doctrine of Interspousal Immunity have decided an issue to some extent in conflict with the decision in Trammel. We would respectfully request this court to consider this point in light of Rule 17.1(c) of this court.

In accordance with Rule 17.1(b) of this court, there is no question that the State Supreme Courts of this country have decided the issue of interspousal immunity differently. The due process and equal protection

issues are clearly signigicant and dispositive in determining whether or not to apply the Doctrine of Interspousal Immunity. It is interesting to review some of the State Supreme Courts' decisions on this issue. In a recent case, the Supreme Court of Nebraska in Emig vs. March, 279 N.W.2d 382 (1979), determined that the doctrine was obsolete and had no basis in law. The court stated at page 384 of its opinion as follows:

> "perhaps the best answer to the 'secrecy and serenity' argument is the response of Professor Prosser, cited with approval in many cases, including Brooks v. Robinson, 259 Ind. 16, 284 N.E. 2d 794 (1972): 'The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has

beaten his wife, there is a state of peace and harmony left to be distrubed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy--and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquillity if she sues him for a tort to her property or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.' Prosser, Law of Torts, 863 (4th Ed. 1971)

The 'avenue for fraud' objection is likewise rationally answered in Brooks v. Robinson, supra: 'Those who advocate this view have simply concluded that since the possibility exists that tort litigation between husband and wife will not constitute a truly adversary proceeding, we should therefore close the courtroom doors to these parties and leave the injured to suffer his loss and the wrongdoer to escape his liability. To adopt such a view requires the blanket assumption that our court system is so ill-fitted to deal with such litigation that the only reasonable alternative to allowing

> husband-wife tort litigation is to summarily deny all relief to this class of litigants. It should be noted that this 'reasonable alternative' is absolutely contrary to the spirit of our legal system--namely, that an injured party may seek redress for his injuries in our courts.' It is the regular business of the courts to find the truth. We ought not deny what should be due the many for fear that the judicial process cannot weed out the spurious claims of a few. Immer v. Risko, 56 N.J. 482, 267 A. 2d 481 (1970)."

In Moulton v. Moulton, 309A 2d 224 (1973), the Supreme Court of Maine also expressed very well the reasons for rejecting the doctrine of interspousal immunity. As in the instant case, in Moulton, the negligence occurred before the marriage. The court stated on page 229 of its decision as follows:

> "It has been argued to us that if there will be a minimum of

> marital discord engendered by the authorization of civil action between husband and wife to enforce causes of action for tortious conduct occurring prior to marriage, it will be largely because the existence of insurance will be the factor inducing husband and wife to agree that the action be brought; and, in such event the common interest of the parties to gain the insurance money will encourage fraud or collusion. When, however, a wrong has been done giving rise to a cause of action, our society regards it of the highest primacy that a remedy be afforded, by resort to Court action if necessary. A generalized policy concern to prevent fraud or collusion, as well as a paternalistic interest to protect the citizenry against itself through the elimination of temptations for fraud or collusion, are, in our view, insufficiently weighty to render tolerable the basic unfairness and inequity inhering in the denial of a remedy to one who has suffered wrong at the hands of another . . ."

In Merenoff vs. Merenoff, 76 N.J. 535, 388 A. 2d 951 (1978), the Supreme Court of New

Jersey abrogated the Doctrine of Interspousal Immunity. On page 957 of the decision the court stated as follows:

> "At the outset of our analysis we accept as fundamental the notion that the essence of our civil laws is to achieve justice and, in so doing, provide redress for wrongful injury. 5 Pound, Jurisprudence, ch. 32 "Duties of Reparation" 283-346 (1959); Holmes, The Common Law 76 (Howe ed.1963). As the United States Supreme Court has recognized recently, this great impulse of our law applies with special force in the tort area where "* * * over the centuries the common law * * * has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights." Carey v. Piphus, 435 U.S. 247, 257, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252, 261 (1968)."

In Freehe vs. Freehe, the Supreme Court of Washington, in 81 Wash. 2d 183, 500 P. 2d 771 (1972), determined that the Doctrine

of Interspousal Immunity was invalid. The court stated in its opinion as follows:

> "The courts may and should take cognizance of fraud and collusion when found to exist in a particular case. However, the fact that there may be a greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases."

See also Digby vs. Digby, 388 A.2d 1 (1978) (Supreme Court of Rhode Island).

It is expected that the respondent will claim that if the Doctrine of Interspousal Immunity is to be abrogated it should be done by the legislature and not by the courts. It is true that there currently is a bill entitled, "Amended Senate Bill 329", being considered by the Ohio Legis-

lature. A portion of the bill would, if passed, abrogate the Doctrine of Interspousal Immunity. The doctrine, however, is a creature of the common law and is therefore judicially created. Petitioner, Juliann Lewis, constitutionally should be able to maintain an action against her now husband and there is no logical basis to state that only the legislature can grant her the right to maintain the action. In Brooks vs. Robinson, 284 N.E.2d 794 (1972), the Supreme Court of Indiana abrogated the Doctrine of Interspousal Immunity and determined that it was not necessary for the legislature to abolish the Doctrine of Interspousal Immunity; that, of course, the courts could do so. This principle has been followed in the jurisdictions which have abrogated the Doctrine of

Interspousal Immunity.

The legal relationships between husbands and wives have recently been in constant change. Women's liberation, the Equal Rights Amendment and the tremendous number of women working outside of the home have caused all courts, including this court, to look more carefully at the marital relationship. When courts speak of the preservation of "marital harmony" they must refer to a realistic concept in light of the true facts of the situation. When a court desires, as it should, to prevent collusion between spouses, the rules drawn by the court must be fair, just and the facts of each case must be considered. In the instant case, Juliann Lewis has suffered catastrophic injuries as the result of the negligence of her now husband.

There is no marital harmony to preserve in denying Juliann Lewis the right to pursue a claim against John M. Lewis. Under no rational basis can anyone think that the marriage of Juliann Lewis and John M. Lewis is enhanced by denying Mrs. Lewis the right to pursue her very valid case. To deny Mrs. Lewis her right to pursue the negligence action against Mr. Lewis is a clear constitutional deprivation of her rights. If the ruling of the Ohio Supreme Court is permitted to stand, Mrs. Lewis would be treated differently than other persons for no rational legitimate state interest. The possible state interests of fostering marital harmony and preventing fraud and collusion simply do not exist in this case. A blanket ruling preventing all spouses from suing the other for negligence simply does

not pass constitutional or fundamental fairness tests. No case could more clearly demonstrate this statement than the case herein. The public is mainly composed of married persons and this case thus has a tremendous interest to persons in this country. This court now has the opportunity to determine that a married person has the same right to commence a negligence action as a single person. In Trammel this court indicated that it was re-examining the relationships between husbands and wives and was striving for fundamental fairness and justice between husbands and wives. All persons would agree that married persons are entitled to fairness and justice in their legal interspousal relationships.

In light of the conflicting decisions

of the various State Supreme Courts on the issue of Interspousal Immunity which definitely involve Fourteenth Amendment due process and equal protection issues, this court's decision in Trammel which indicates this court's attitude to the marital relationship and to the concept of marital harmony, and most important because petitioner, Juliann Lewis, has sustained an overwhelming deprivation of due process and equal protection rights, there are special and important reasons for this court to grant petitioners Writ of Certiorari. Fundamental fairness requires that when a person living in this country sustains the catastrophic injuries sustained by Juliann Lewis as a result of the negligence of another person, she be able to at least present her case to a jury. For all of

the reasons stated herein, it is respectfully requested that this court grant Petitioner's Writ of Certiorari.

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A P P E N D I X

A

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1980 TERM
)
City of Columbus.) To wit: June 27, 1980

Juliann Lewis, No. 80-676

Appellant,

vs.

Nationwide Mutual Insurance Company et al.,

Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS for Franklin County TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Lawrence A. Berlin.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copies from the Journal of this Court.

Witness my hand and the seal of the Court.

B

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1980 TERM
)
City of Columbus.) To wit: June 27, 1980

Juliann Lewis, No. 80-676

Appellant, APPEAL FROM THE COURT OF APPEALS

vs.

for FRANKLIN County

Nationwide Mutual Insurance Co., et al.,

Appellees.

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County

for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copies from the Journal of this Court.

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

Juliann Lewis, :

Plaintiff-Appellant, :

v. : No. 79AP-857

Nationwide Mutual Insurance Company, et al., :

Defendants-Appellees. :

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on March 13, 1980, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

WHITESIDE, REILLY AND McCORMAC, JJ.

By S/Alba L. Whiteside
Judge Alba L. Whiteside

cc: Leonard S. Sigall
Lawrence A. Berlin
William H. Jones & Jeffrey M. Brown

Filed Court of Appeals, Franklin County, Ohio, 1980, Mar 13 PM 4:15, Thomas J. Enright Clerk of Courts

C

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

Juliann Lewis, :

Plaintiff-Appellant, :

v. : No. 79AP-857

Nationwide Mutual Insurance :
Company, et al.,

Defendants-Appellees. :

D E C I S I O N

Rendered on March 13, 1980

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WHITESIDE, J.

Plaintiff appeals from a judgment of the Franklin County Court of Common Pleas and raises six assignments of error as follows:

> "I: The trial court erred in sustaining defendants-appellees' motion for summary judgment.
>
> "II: The trial court erred in not ruling that the doctrine of spousal immunity is unconstitutional as the doctrine violates Article I, §16, of the Ohio Constitution and violates the due process and equal protection clauses of the XIV amendment to the United States Constitution.
>
> "III: The trial court erred in not ruling that where a defendant negligently operates an automobile causing severe injuries to a plaintiff as a result of said negligence and subsequently the parties marry, the plaintiff is entitled to pursue a negligence action against the defendant for the severe injuries that she has suffered.
>
> "IV: The trial court erred in not ruling that the doctrine of spousal immunity is not to be

applied when it is apparent that the parties to the lawsuit did not plan the incident giving rise to the lawsuit and where the lawsuit does not jeopardize the marital relationship.

"V: The trial court erred in not ruling that where a defendant negligently operates an automobile causing plaintiff severe injuries and later the parties marry, the plaintiff is entitled to have a jury determine if there is any collusion between the parties regarding the lawsuit.

"VI: The trial court erred in ruling that defendant-appellee, Nationwide Mutual Insurance Company, is not a proper party to this action pursuant to appellant's claim on the uninsured motorists coverage of her insurance policy contract."

On February 4, 1978, plaintiff, then Juliann Mullican, sustained severe injuries as the result of defendant, John M. Lewis, negligently operating his automobile, in which plaintiff was a passenger, off the road and into an ice bank.

Although the parties were not engaged and had no marriage plans prior to the accident, they were married several weeks thereafter, on March 17, 1978, having been acquainted for approximately one year.

Assignments of error I, III, IV and V raise essentially a single issue, namely, whether a suit based on negligence may be maintained between spouses living together, for severe injuries sustained prior to the marriage when it is demonstrated that no fraud or collusion is involved and the action does not jeopardize the marriage. This question was expressly answered by the Supreme Court in the third paragraph of the syllabus of Thomas v. Herron (1969), 20 Ohio St. 2d 62, which holds as follows:

> "A suit based on negligence may not be maintained between spouses living together, for injuries

sustained prior to the marriage."

No matter how sympathetic this court may be toward plaintiff because of the unusual circumstances involved in this case, we are bound to follow the judgment of the Supreme Court in Thomas, which is entirely controlling and dispositive.

Plaintiff's contention that the rule should not apply under the circumstances of this case, must be addressed to the Supreme Court, since this court has no authority either to overrule or modify Thomas. Accordingly, the first, third, fourth and fifth assignments of error are not well taken.

By the second assignment of error, defendant contends that the doctrine of spousal immunity is unconstitutional and in violation of Section 16, Article I, Ohio Constitution and the due process and equal

protection clauses of the XIV Amendment to the United States Constitution. Again, this argument must be addressed to the Supreme Court. It is beyond the providence of this court, as an intermediate appellate court, to hold that the controlling decision of the Ohio Supreme Court is unconstitutional. That court, not only considered the basic issues in Thomas, supra, but also considered them in Lyons v. Lyons (1965), 2 Ohio St. 2d 243, and Varholla v. Varholla (1978), 56 Ohio St. 2d 269, although each of these cases involved personal injuries received as a result of an alleged negligent tort of the other spouse, where the married parties were living together as husband and wife at the time of the alleged injury. In Varholla, however, the Supreme Court apparently gave some consideration to the con-

stitutional question, since this was one of the bases for the dissent, but found "that the interspousal immunity doctrine, with its inherent differential treatment of spouses and non-spouses, reasonably relates to the legitimate state of interest of fostering marital harmony and preventing fraud and collusion." While Varholla related to parties married at the time of the injury, this case is distinguisable since a party not married at the time of the injury is being treated differently than other persons in a like situation at the time of injury, because of the subsequent marriage of the injured party to the tortfeasor. However, Thomas expressly holds that interspousal immunity applies under such circumstance. Accordingly, the second assignment of error is not well taken.

By the sixth assignment of error, plaintiff contends that the trial court erred in ruling that defendant, Nationwide Mutual Insurance Company, is not a proper party to this action. Plaintiff apparently contends that since the doctrine of spousal immunity prevents her from maintaining an action against defendant, her husband, she should be entitled to proceed directly against her own insurance carrier under the uninsured motorists coverage of her policy.

However, this is not a case of no coverage or no insurance available, but rather a case of non-liability, because of the spousal immunity doctrine. Furthermore, to allow the action directly against the insurance carrier would be contrary to the decisions in Lyons, Thomas and Varholla, supra, in that in each of those cases, it

is stated that one of the reasons for the doctrine of spousal immunity is the prevention of fraud and collusion in an effort to recover insurance proceeds, in Thomas it being stated at 67:

> "Lyons (2 Ohio St. 2d 243, 244) also recognized that in the case where the defendant in fact is the defendant-spouse's liability insurer, there is a possibility that the spouses will be induced to 'raid' the insurance carrier for a windfall recovery. Even in the case of a substantial injury, the probability exists that the element of liability, as well as pain and suffering, would be susceptible of exaggeration because of the intimate relationship of the parties. The fact that the injury occurred before the parties were married does not extinguish this risk."

In Lyons it is stated at 245 of the opinion:

> "There is the real danger of fraud or collusion between the spouses in such suites against each other, where insurance is involved. Such suits encourage raids upon insurance companies. * * *

" * * *

"In truly adversary cases, fraud is likely to be uncovered because of the desire of the defendant to avoid the loss. Where insurance is involved, the risk of loss is removed, and both spouses stand to gain from a decision adverse to the defendant. This creates a strong inducement to trump up claims and conceal possible defenses. * * *"

Even if, predicated upon the availability of the defense of lack of cooperation of the insured in defending this action, this court were to disagree with the Supreme Court's discussion of the potentiality of fraud against an insurance company, we are bound to follow the rationale of the Supreme Court. It is clear, that one of the underlying reasons for the doctrine of spousal immunity, as adopted by the Supreme Court, is to prevent potential fraud or collusion between the spouses in

an effort to gain insurance proceeds. This risk is no less because uninsured motorist coverage, rather than ordinary liability coverage, is involved. Accordingly, the sixth assignment of error is not well taken.

For the foregoing reasons, all six assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

REILLY and McCORMAC, JJ., concur.

COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

JULIANN LEWIS :

Plaintiff :

vs. : Case No. 79CV-03-1275

NATIONWIDE MUTUAL :
INSURANCE CO.

Defendant :

D E C I S I O N

Rendered this 4th day of October, 1979.

TYACK, J.

Motion of Defendants, Nationwide Mutual Insurance Company and John M. Lewis, for summary judgment is hereby SUSTAINED.

This State still recognizes interspousal immunity. The reasons for such immunity still exist, even though the parties subsequently remarry. The Complaint alleges an accident on February 4, 1978. The plaintiff and defendant, John M. Lewis,

D

married on March 17, 1978 and are still husband and wife.

> "A suit based on negligence may not be maintained between spouses living together, for injuries sustained prior to the marriage." Varholla v. Varholla, 56 Oh.St. 2d 269.

As to Nationwide, under any circumstances, it is not a proper party. A direct action does not lie against the insurance carrier in a negligence action.

Counsel for Defendants shall prepare and file proper Judgment Entry per court rule.

S/George E. Tyack
GEORGE E. TYACK, JUDGE

Appearances:
Leonard S. Sigall
Lawrence A. Berlin
Attorneys for Plaintiff

William H. Jones, Attorney for Defendants

FILED COMMON PLEAS COURT FRANKLIN CO., OHIO
1979 OCT 5 PM 2:00 Thomas J. Enright Clerk of Courts

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

JULIANN LEWIS, :

Plaintiff :

v. : No. 79CV-03-1275

NATIONWIDE MUTUAL INSURANCE COMPANY, : Judge Tyack

Defendant :

ENTRY

Pursuant to the Court's decision of October 5, 1979, defendant's Motion for Summary Judgment is hereby sustained.

Exceptions to the plaintiff.

S/George E. Tyack
TYACK, J.

APPROVED:

S/Lawrence A. Berlin
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FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
1979 NOV -6 PM 1:25
THOMAS J. ENRIGHT
CLERK OF COURTS

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MICHAEL S. LEHV, M.D., Inc.

5180 East Main St. (614) 864-0160
Columbus, Ohio 43213

February 22, 1979

Mr. Lawrence A. Berlin
Attorney at Law
P. O. Box 244
6470 East Main Street
Reynoldsburg, Ohio 43068

Re: Juliann Lewis

Dear Mr. Berlin:

I am in receipt of your letter of January 25, 1979, regarding Juliann's injury of last year. The following narrative should supply the information which you desire.

As indicated, Juliann was injured in an automobile accident on February 4, 1978, and was apparently brought directly to the emergency room at Mount Carmel East Hospital. I did not see Juliann until the next morning at which time evaluation was under-

taken. According to the patient, she had fallen asleep and during the accident had struck her face against the interior of the car. On examination, there was a massive facial injury with complete distortion of her normal appearance. In fact, in our first conversation, the patient related that she no longer appeared as she used to, and would have to give me some pictures to show how she normally appeared. Basically, the entire middle third of the face from the upper lip to the forehead was pushed inward from the impact. In addition, the nose was additionally telescoped inward from the impact. Furthermore, that portion of the upper jaw containing the teeth was seperately broken away from the middle third of the face. My examination, together with the x-ray

findings, suggested that this was a combination of LeForte I, II, and III fractures. These are designations for fractures of the maxilla. A LeForte I fracture is a simple breaking of the bone just above the upper teeth and thus loosening the upper jaw. A LeForte II fracture breaks the face in a pyramidal fashion starting at the root of the nose and extending down to the teeth in such a way that the teeth and nose can be moved as a unit seperate from the other portions of the face. In a LaForte III fracture, the entire middle third of the face is broken away from the skull in such a way that the mouth, nose, and eyes can be moved seperately from the forehead. While it is not uncommon to see various combinations of these fractures in one individual, it is rather uncommon to see

all three types simultaneously with a seperate nasal fracture. Thus, this was a very severe facial injury, to say the least.

On February 10, 1978, a major operation was undertaken to repair these injuries. The enclosed operative note should supply the necessary details. Basically, various fractures were wired together. Small pieces of plastic were placed on the orbital floor to provide a firm surface for the eyes. The portion of the upper jaw, containing the teeth, was wired to the remaining portions of the face. The entire middle third of the face was loosened and realigned and a halo-type of external fixation apparatus applied. This is a metal ring with sharp pins, which is fastened around the skull like a halo. Projecting from this ring are various metal struts

to which wires with turnbuckles can be attached to various portions of the face to apply traction as deemed necessary. A tracheostomy was performed to provide an adequate airway in the immediate postoperative period. Juliann did quite well after this initial surgery, and I believe her general facial contour was restored by these procedures. On March 28, 1978, the wires and bands, which had been placed on her teeth, were removed under a brief general anesthetic.

Over the next several months, Juliann gradually regained strength and further evaluation was made. It appeared that the major problem following surgery, was distortion of the nose. In addition, there was some scarring of the lower eyelid and the area of the previous tracheostomy. On

June 1, 1978, the patient was readmitted to the hospital, at which time a rhinoplasty, septoplasty, and scar revision was carried out. Subsequently, Juliann has done quite well and has eventually returned to work.

I last saw Juliann, February 5, 1979, for follow-up exam. At that time, she looked quite well. The nose was reasonably straight and the profile within normal limits. There was a mild middle-third depression, but I do not believe that this is of any clinical or cosmetic significance. None of the facial scars is particularly noticeable, although the tracheostomy scar which has been revised, is somewhat pigmented. The only problem which I saw, was some boney irregularity in the infraorbital region which, as I explained to Juliann, could be smoothed out as an

additional procedure in the future. This is something which she is going to consider and let me know. Otherwise, sensation and the senses of taste, hearing, smell, and vision, all seemed to be within normal limits. The patient's only subjective complaint is that of increased sinus or nasal drainage, particularly at night, which could be more thoroughly evaluated if it becomes a significant problem.

In summary, Juliann sustained a major facial injury in February, 1978, and has had an initial repair and secondary reconstructive surgery. There is a boney prominence of the left cheek which could be improved by a not too major additional procedure. Otherwise, she has survived this injury with only mild residual pro-

blems. If there is any further information which you desire, please let me know.

Yours sincerely,

S/Michael S. Lehv, M.D.
Michael S. Lehv, M.D.

MSL:njm
Enclosures-2

Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-363

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JULIANN LEWIS,

Petitioner,

vs.

JOHN M. LEWIS AND
THE NATIONWIDE MUTUAL INSURANCE
COMPANY,

Respondents.

BRIEF IN OPPOSITION TO GRANTING PETITIONER'S WRIT OF CERTIORARI

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No. 80-363

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JULIANN LEWIS,

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vs.

JOHN M. LEWIS AND
THE NATIONWIDE MUTUAL INSURANCE
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Respondents.

BRIEF IN OPPOSITION TO GRANTING PETITIONER'S WRIT OF CERTIORARI

STATEMENT OF THE CASE

The present case arises out of a February 21, 1978 automobile accident in which the petitioner, Juliann Lewis, was a passenger in a motor vehicle driven by respondent, John Lewis. Co-respondent, Nationwide Insurance Company, insured the car which at the time of the accident was owned by Juliann Lewis. On March 17, 1978, the above mentioned parties were married and three days later Mrs. Lewis filed a negligence action against Mr. Lewis and Nationwide Insurance.

A Motion for Summary Judgment was filed by defendants at the trial level and was sustained by the judge who based his decision on the Doctrine of Interspousal Im-

munity. (See Pet. Appendix D and F.) The Franklin County Court of Appeals affirmed the decision (Pet. App. C1-C11) and the Supreme Court of Ohio dismissed the appeal.

SUMMARY OF ARGUMENTS IN OPPOSITION TO GRANTING THE WRIT

The decision from which this Writ of Certiorari is requested is that of the intermediate Court of Appeals. Supreme Court review would then be precluded in that the decision relies upon adequate and independent state grounds in following the Doctrine of Interspousal Immunity and did not deal with a substantial federal question.

While the Court has recently decided the case of *Trammel* v. *United States,* 63 L Ed 2d 126 (1980), any alleged similarity is quite superficial and is distinguishable on the facts.

The issue of the abrogation of interspousal immunity should properly remain in the hands of the legislature.

ARGUMENTS IN OPPOSITION TO GRANTING THE WRIT

In *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* (1954) 347 US 157, 98 L Ed 583, 74 S Ct 396 reh den 347 US 931, 98 L Ed 1083, 74 S Ct 528, this court stated:

> Appeal is properly taken from decision of state intermediate appellate court and not from that of highest court of state where highest court of state refused appellant's application for writ of error, even though under state law such refusal signifies that highest state court deems judgment of intermediate appellate court correct one and principles of law declared in opinion correctly determined.

Also in *Chicago and E.I.R. Co.* v. *Industrial Commission of Illinois,* (1932) 284 U.S. 296, 76 L Ed 304, 52 S Ct 151, it was held:

> 1. Where the highest court of a state, in the exercise of its discretion, has declined to review a judgment of a lower court, a writ of certiorari from the Supreme Court of the United States to review the state judgment is properly addressed to the lower court.

In the case at bar, given the refusal of the Ohio Supreme Court to hear the case, the writ of certiorari requested is to review the decision of the Franklin County Court of Appeals (see Pet. App. C1-C11). In that decision the court did not deal with the constitutional issue that petitioner raised, stating that as an intermediate Court of Appeal it was beyond their providence to hold a controlling decision of the Ohio Supreme Court unconstitutional.

In affirming the lower court's ruling it discussed extensively the controlling Ohio case law in support of the Doctrine of Interspousal Immunity.

The first was the on point Ohio Supreme Court case of *Thomas* v. *Herron* (1969), 20 Ohio St. 2d 62, 253 N.E. 2d 772, which held:

> A suit based on negligence may not be maintained between spouses living together, for injuries sustained prior to the marriage.

Thomas cited a similar Supreme Court case, *Lyons* v. *Lyons,* 2 Ohio St 2d 243, 208 NE 2d 533 (1965) and went on to state:

> *Lyons* (2 Ohio St. 2d 243, 244) also recognized that in the case where the defendant in fact is the defen-

> dant-spouse's liability insurer, there is a possibility that the spouses will be induced to 'raid' the insurance carrier for a windfall recovery. Even in the case of a substantial injury, the probability exists that the element of liability, as well as pain and suffering, would be susceptible of exaggeration because of the intimate relationship of the parties. The fact that the injury occurred before the parties were married does not extinguish this risk.

In *Lyons, supra,* it is stated at 245 of the opinion:

> There is the real danger of fraud or collusion between the spouses in such suits against each other, where insurance is involved. Such suits encourage raids upon insurance companies. * * *
>
> * * *
>
> In truly adversary cases, fraud is likely to be uncovered because of the desire of the defendant to avoid the loss. Where insurance is involved, the risk of loss is removed, and both spouses stand to gain from a decision adverse to the defendant. This creates a strong inducement to trump up claims and conceal possible defenses. * * *

In *Varholla* v. *Varholla,* 56 Ohio St 2d 269, 388 NE 2d 88 (1978) the Ohio Supreme Court most recently reaffirmed its support of the doctrine when it stated:

> Suffice it to say that we adhere to the principles expressed in *Lyons,* in the belief that they are as sound today in social policy as they are in reason. *Appellant's contention cannot be accepted in disregard of clear precedent.* (Emphasis Added)

The decision then rests upon an application of clear precedent supporting interspousal immunity in Ohio. While there may exist a constitutional question, involved the basis here was an adequate and independent state ground.

In *Herb* v. *Pitcairn* (1954) 324 US 117, 125, 65 Sup Ct 459, 89 L Ed 789, Justice Jackson stated:

> This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.

In *Fox Film Corp.* v. *A. B. Mueller* (1935) 296 US 207, 56 S. Ct. 183, 80 L Ed 158, it was held:

> . . . the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.

Also Justice White in *New York Times* v. *Jasealevich*, (1978) 439 US 1317, 995 S Ct 6, 58 L Ed 2d 25, stated:

> Whether a state-court judgment is subject to review by the Supreme Court on writ of certiorari is in turn governed by 28 USC § 1257 [28 USCS § 1257], which provides that we have jurisdiction to review '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . .' Also, it is only final judgments with respect to issues of federal law that provide the basis for our appellate jurisdiction with respect to state-court cases.

The respondent is well aware that favorable state law is not dispositive when one is seeking higher court review, however it is submitted that the state cases on point not only follow an unbroken line of authority but are based upon sound and reasonable policy decisions. Whether or not the federal question is of such a substantial nature or of sufficient importance as to deserve review is not the issue since the independent and adequate state basis precludes the granting of the writ.

The petitioner has also cited *Trammell* v. *U.S.*, 63 L Ed 2d 126 (1980) as indicative of the court's thinking with respect to matters between husbands and wives.

In *Trammell,* it was held that:

> 1a-1c. The privilege against adverse spousal testimony vests in the witness spouse alone, and that witness may be neither compelled to testify nor foreclosed from testifying; that the testimony by a spouse in a criminal prosecution comes after a grant of immunity and assurances of lenient treatment does not render the spouse's testimony involuntary.

Justice Burger drives home the logic of this position when he states:

> The contemporary justification for affording an accused such a privilege is also unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding -- whatever the motivation their relationship is almost certainly in disrepair; *there is probably little in the way of marital harmony for the privilege to preserve.* [Emphasis Added.] In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.

This reasoning however is clearly not applicable to the present case. While it is true that in *Trammel, supra,* and the present case, marital harmony was and probably will not be adversely affected, the reasons are totally different. In the former case it was clear that the testimony of the wife was directly against her husband and led to negative results; his imprisonment, and her willingness to testify were indicative of their relationship (i.e., a lack of any marital harmony to be preserved).

In the case at bar, however, the testimony of Mrs. Lewis is not directed against her husband but in reality against Nationwide Insurance Company and could well lead to a very positive result, a judgment in her favor. Obviously the marital harmony (which still appears to exist) of Mr. and Mrs. Lewis would not be affected as any judgment would accrue to both their benefit. It follows just as obviously that Mr. Lewis has no motivation to be his wife's adversary. In the instant case it is this lack of an adversary proceeding and the very real possibility of fraud and collusion and not the "preservation of marital harmony as in *Trammel, supra,* that led the courts in this case to base their decision on the Doctrine of Interspousal Immunity as it is recognized in Ohio.

It should also be of interest to the Court, as mentioned by petitioner, that the Ohio Legislature is presently considering a bill which abrogates the doctrine of interspousal immunity.

In *Ferguson* v. *Shrupa,* 372 US 726, 732, 10 L Ed 2d 93, 83 S. Ct. 1028 (1963) this Court stated it is only "invidious discrimination" which offends the constitution and stated:

> The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases — that due process authorizes courts to hold laws constitutional when they believe the legislature has acted unwisely — has long

since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.

CONCLUSION

For the foregoing reasons the respondent would oppose any granting of the petitioner's writ of certiorari and asks that such writ be denied.

Respectfully submitted,

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